Supreme Court, U.S.
FILED
APR 28 1992
OFFICE OF THE CLERK

(3)

No. 91-1514

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE, *et al.*,

Appellants,

vs.

THE STATE ADMINISTRATIVE BOARD OF ELECTION LAWS, *et al.*,

Appellees.

REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM

---

*JOHN R. GREIBER, JR.
COUNCIL, BARADEL, KOSMERL & NOLAN, P.A.
125 West Street
Annapolis, MD 21401
(410) 268-6600

Counsel for Appellants

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The issue of "creating a minority voting district" was raised, briefed, argued to and ruled on by the Court below 1

II. The issue of "recognizing incumbent representation, with its attendant seniority" and the creation of "safe seats" for incumbents was raised, briefed, argued to and ruled on by the Court below and the individual appellants do have standing 7

III. When a State arranges the electoral process to achieve political ends or allocate political power their acts are not exempt from judicial scrutiny either under White v. Weiser or Gaffney v. Cummings 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:	Page
Gaffney v. Cummings, 412 U.S. 735 (1973)	13, 14
Karcher v. Daggett, 462 U.S. 725 (1982)	4, 13, 14
Kirkpatrick v. Pressler, 394 U.S. 526 (1969)	13
Roman v. Sincock, 377 U.S. 695, 710 (1964).	15
United Jewish Organizations v. Carey, 430 U.S. 144, 155 (1977)	2, 3
University of California Regents v. Bakke, 438 U.S. at 304, 305 (1977)	3
White v. Weiser, 412, U.S. 783 (1973)	12, 13

ARGUMENT I

The issue of "creating a minority voting district" was raised, briefed, argued to and ruled on by the Court below.

On pages 24 and 25 of Appellee's Motion for Summary Judgment below, they state "(1) creating a presently viable voting rights district" ... with a "68.89% minority" population was a justified goal and "clearly articulated" by the Redistricting Committee. They continue, on page 25, "Everyone assumed that failure to create a majority black district would have lead to a lawsuit challenging the plan under the Voting Rights Act. [19]" Footnote 19 stated, "Plaintiffs ... cannot show that it

violated any constitutional provision for the State to create District Four. See United Jewish Organizations v. Carey, 430 U.S. 144, 155 (1977)." Later on page 44 of their Motion, the State again writes that United Jewish Organizations "foreclosed" any attempt "to contest the State's power to draw a minority congressional district" "regardless of whether such redistricting was designed to eliminate the effects of past discrimination." (Emphasis supplied). Then on page 45 the State continued, "United Jewish Organizations involved a State's response to Sec. 5 of the Voting Rights Act Ratner (Sic) than the creation of a minority seat in light of Sec. 2 of the Act. However, this does not warrant a constitutional difference." If any of this is correct, why did the State not

respond substantively to this Court's interpretation of United Jewish (cited by Appellants) in the Bakke decision, that United Jewish "... properly viewed is a case in which the remedy [was] for an administrative finding of discrimination ...", 438 U.S. at 304, 35 (1977); Jur. State. 24. (Emphasis supplied.)

To this, Appellants responded with twelve pages in their Memorandum of Law titled and referred to in their Table of Contents as "Minority District". The sum and substance of these twelve pages was that "race conscious redistricting absent Sec. 5 or discriminatory result under Sec. 2" ... "has never been held constitutional by the Supreme Court and clearly it should not be as it represents a step back from true equality for all people, minority or non-minority and only

serves to foster notions of bigotry and reverse discrimination."

Clearly and beyond all doubt Appellants' Jurisdictional Statement raises no new claim regarding the constitutionality of the state creating a "minority district" absent discrimination. Furthermore, the divided court below clearly considered this issue and one need only read their opinions. The majority ruled that while "the establishment of a majority black district" was not "listed specifically in Karcher ... preserving the strength of racial minority groups was" and that "these aims, however, are clearly within Karcher's ambit." Jur. State. App. 23a. And Circuit Court of Appeals' Judge Niemeyer noted, correctly, "The need to draw representative Hoyer a new district

arose from the perceived need to create a black majority district ..." Jur. State. App. 78a. Judge Niemeyer also noted, during oral argument, regarding the creation of a minority district and whether the votes of white residents who reside in the new minority district would be diluted;

> "that is the famous argument, and it is not played out yet, that affirmative action, while it corrects one form of discrimination, may affect another type".

Finally, in an end run around this issue, Appellees contend that it is Appellants, rather they, who must prove a Sec. 2 Voting Rights Act violation. This is indeed novel. To the contrary, however, Appellants did in fact satisfied

their burden of proof and offered uncontradicted evidence that there was no discrimination present in what is now the minority district and it is equally clear that the State did not and could not show the requisite discrimination necessary to "create" the minority district. However, the plain fact of the matter is the cornerstone of the Act is a showing of discrimination of the type which prevents meaningful participation in the electoral process by a protected class and this burden rests squarely with the State.

Again, pass being novel this unique attempt to shift their clear burden of proof only draws attention to the fact that the state did not and could not respond substantively to the issue that absent discrimination race conscious redistricting has never been held

constitutional.

ARGUMENT II

The issue of "recognizing incumbent representation, with its attendant seniority" and the creation of "safe seats" for incumbents was raised, briefed, argued to and ruled on by the Court below and the individual appellants do have standing.

First, on pages 16 and 17 of Appellants' Memorandum of Law below, the following argument is made. "Furthermore, defendants have not presented any evidence establishing that H.B. 10 was not invidiously created to protect and to create safe seats for congress persons. With specific reference to Congressman Hoyer, Senator

Miller and Speaker Mitchell dispute these allegations while Senator Pica, Delegate Bishop and Chris Griffen (Congresswoman Bently's Aide) indicate that it was "common knowledge" that there was to be a safe seat for Congressman Hoyer and that other districts were drawn to protect or assure the election of the other congress persons. See Pica Dep. at page 51. See also Exhibit 2 P.G. Journal 6-25-91. While the members of the legislature may have been convinced that safe seats were necessary to protect incumbents neither the constituents or residents statewide were. (Exhibit 3, Mason Dixon Pole in P.G. Co. Journal of 9-4-91.) Continuing on this same page, Appellants continued their argument that "under H.B. 10, Congressman McMillen and Gilchrest must run against one another in the First

Congressional District. The reason for this is clear: ability aside, See Miller Dep. at pg. 57-58, these incumbents are lowest on the totem pole of congressional seniority. Finally, the alternative plan H.B. 22, persevered the cores of all eight former congressional districts, avoided contests between incumbents, and more closely approximated population."

Furthermore, Judge Smalkin noted in the Majority Opinion "the evidence, as the dissent states, shows that the General Assembly, inter alia, aimed to give Congressman Hoyer, a congressman with high ranking and importance in the Federal House of Representatives a "safe seat" to provide the majority black population ... with a chance to choose a representative without requiring that person to run against a strong incumbent

such as Congressman Hoyer, and to provide certain opportunities for Congressman Bently and Congressman Cardin." Jur. State. App. 22a and 23a.

Also, Circuit Judge Niemeyer held in his Dissenting Opinion that "in light of this evidence I find that the State did not use neutral criteria to establish its eight congressional districts. Instead, the driving force behind the placement of the new district boundaries was a desire to promote the election bids of certain incumbent representatives at the expense of other less senior incumbents. The Constitution gives to the voters of Maryland a right to make their own choices about re-electing their present Congressman to represent them again in Congress. The State's attempt to defeat that right by manipulating district lines

either by unnecessarily pitting incumbents against one another or by enhancing the prospects of one candidate over another cannot be reconciled with Article I, Sec. 2 and Wesberry" Jur. State. App. 81a and 82a.

Finally, Appellants incredulous notion that because "no member of Maryland's Congressional Delegation" is a party to this case that Appellants do not have standing to raise the issue of the State of Maryland's unconstitutional classification of congressional representatives on the basis of their seniority, is inconsistent with the fundamental understanding and meaning of representative government, as any right a U.S. Representative has is derived from "the people". Nonetheless, this transparent avoidance of answering

Appellants substantive argument on this issue is quickly and fatally treated by the following quoted text of White v. Weiser, 412 U.S. 783, 786 (1973). "On October 19, 1971, Appellees, residents (emphasis supplied) of the 6th, 13th, 16th and 19th congressional districts filed suit in the United States District Court for the northern district of Texas against Appellant, The Secretary of the State of Texas and the Chief Election Officer of the State. Appellees alleged that the reapportionment of the Texas Congressional Seats is embodied in S.B. 1 violated their rights under Art. I, Sec. 2 and the Equal Protection Clause of the Fourteenth Amendment."

Clearly and without any doubt Appellants did raise this issue below and do have standing to raise it on Appeal.

ARGUMENT III

When a State arranges the electoral process to achieve political ends or allocate political power their acts are not exempt from judicial scrutiny either under White v. Weiser or Gaffney v. Cummings.

The States' erroneous contention that this Court should defer to the will of a legislature and their political considerations contained in a congressional redistricting plan is a misreading of the clear meaning of Kirkpatrick v. Pressler, 394 U.S. 526 (1969), White v. Weiser, 412 U.S. 783 (1973), Karcher v. Daggett, 462 U.S. 725 (1982), and Gaffney v. Cummings, 412 U.S. 735 (1973). A correct reading of these

cases stands for a common mandate - that this Court is willing to defer to State legislative policies in congressional redistricting, "so long as they are consistent with Constitutional norms", Karcher at 740, "not ... vulnerable to legal challenge", Weiser at 797, as when attempting to draw districts of equal population "the rule is one of practicability rather than political practicality," Preisler at 533. Furthermore, a correct reading of Gaffney, (a state legislative redistricting case ~~not~~ subject to the stricter requirements inherent in congressional redistricting) also holds that even though districts are perfectly acceptable under equal population standards, "We must respond ..., to Appellees claims in this case" that "a

political fairness principal was followed ..." for "What is done in so arranging of elections to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment", 412 U.S. at 751, 754 (1973).

Thus it is not, as Appellees suggest, "preposterous" to contend that political considerations may well and often do violate Article I, Sec. 2 or other constitutional mandates.

Also, as this Court stated in Roman v. Sincock, 377 U.S. 695, 710, "the Constitution permits such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." How can race conscious redistricting, absent discrimination, and

preferential treatment of senior congressmen in redistricting be anything but "arbitrary" or "discriminatory"?

CONCLUSION

Appellees failure to respond in a substantive manner to the substantial questions presented by Appellants' Jurisdictional Statement should further serve to emphatically point out the validity of what Fourth Circuit Court of Appeals Judge Paul V. Niemeyer concluded - "I would not permit an election to proceed on the basis of H.B. 10" Jur. State. App. 82a.

For the above further reasons, this Court should note probable jurisdiction and expeditiously reverse the judgment of the District Court.

Respectfully submitted,

John R. Greiber, Jr. *
Council, Baradel, Kosmerl
& Nolan, P.A.
125 West Street
Annapolis, MD 21401

*Counsel of Record